Sands Point Nursing Home *and* United Industry Workers Local 424, a Division of United Industry Workers District Council 424, Petitioner. Case 29–RC–8391

October 23, 1995

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On April 4, 1995, the Board granted the Employer's and the Intervenor's[1] requests for review of the Regional Director's Decision and Direction of Election with respect to whether the Regional Director properly directed an election in the petitioned-for single employer units, rather than multiemployer units.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully reviewed the record, the Board has decided to reverse the Regional Director's determination that the single employer units are appropriate.

A single employer unit is presumptively appropriate and a party urging a multiemployer unit must demonstrate a controlling history of bargaining on a multiemployer basis and an unequivocal intent by the employer to participate in and be bound by the results of group bargaining. *Hunts Point Recycling Corp*., 301 NLRB 751, 752 (1991); *Meat Packers Assn*., 223 NLRB 922, 924 (1976). See also *Maramount Corp*., 310 NLRB 508, 511 (1993). Recognizing that the problems of each member of a multiemployer group are not always identical, the Board has found that limited adjustments to a multiemployer contract made through individual negotiations are not inconsistent with an intent to be bound by multiemployer bargaining. *The Kroger Co*., 148 NLRB 569 (1964).

We find that there is a history of bargaining by the Employer on a multiemployer basis and an unequivocal intent by the Employer to participate in and be bound by the results of group bargaining. The record supports the Employer's and the Intervenor's contentions that the Regional Director overstated the scope of the individual negotiations on the Employer's behalf. The Regional Director mistakenly found that individual bargaining applied to virtually all economic terms of employment. This bargaining, which resulted in limited contractual adjustments, arose, however, within the framework of the multiemployer bargaining relationship and was contemplated by the multiemployer Master Agreement.

For at least 20 years, the Employer has been a member of the Greater New York Health Care Facilities Association (the Association), which has negotiated a series of contracts with the Intervenor covering various nursing homes, including the Employer. The Employer follows and applies about 50 of the provisions set forth in the most recent Master Agreement that was negotiated between the Association and the Intervenor. The Master Agreement includes an Industry Standards Clause that was designed to raise compensation rates of nonparity employers, such as the Employer, to master levels and pursuant to which the Intervenor and the Association have conducted separate negotiations relative to the Employer and other nonparity employers to bridge the gap.

With regard to economic terms, the record shows that there are differences between the Employer's rates and master rates with respect to certain wages, wage increases, benefit fund contributions, and a few limited areas,[2] as found by the Regional Director. In certain aspects, however, these terms are identical or are governed by the Master Agreement's Industry Standards provision contemplating multiemployer negotiations to achieve parity, or both.

Thus, with regard to wages, the Employer's LPNs have received master level salaries pursuant to multiemployer negotiations under the Industry Standards Clause. Although the Regional Director correctly concluded that the wages of the Employer's paraprofessionals are different from master wages and cannot be determined specifically from the Master Agreement, the Regional Director was mistaken in finding that the Master Agreement does not provide a schedule for nonmaster wage increases. The ''Wage Increases'' provision in the agreement provides that in the case of nonmaster facilities, ''the amounts of the wage increases and the minimum rates of pay referred to . . . above shall be the product of the percentages set forth above applied to the correct rates in each facility.'' As Association President Bartholemew Lawson testified, the percentages and dates of increases set forth in the ''Wage Increases'' provision apply to both parity and nonparity homes. Marvin Ostreicher, who is in charge of operations for both the Employer and a master level home, testified that the Association sends the same memo to each home when a contractual increase is due, and that he implements the same percentage increase at the same time for both homes that he manages, although the dollar amount of the increases are different for nonparity homes because those homes

[1] Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, Service Employees International Union, AFL–CIO.

[2] Thus, there are differences between master and nonmaster employers regarding shift differentials, uniform allowances, and lunch periods. The Employer gives its employees 15 minutes longer for lunch. Although not specified in the contract, the Employer's paraprofessional employees receive a 5-percent lower shift differential than similar employees at master homes, which is about $20 per week. About 20 to 30 percent of the Employer's paraprofessional employees are affected by this difference. Although not mentioned in the Master Agreement, the Employer makes daily rather than weekly calculations in computing its uniform allowance.

start at lower rates of base pay. The Master Agreement's ''Wage Increases'' provision is also pertinent to the Employer because it expressly recognizes that the nonparity homes start at a lower rate of base pay.

Similarly, the Master Agreement's provisions pertaining to the mechanics of employers' welfare and benefit fund contributions apply to both master and nonparity homes, and the ''Fund Contribution Rates'' provision recognizes a lower contribution base for nonparity employees based on their lower wage rate.[3] The testimony also establishes that the Employer's employees receive fund *benefits* at master levels.[4]

With respect to sick, vacation, and longevity pay, the Intervenor contends that the Regional Director erred in dismissing the fact that just prior to the filing of the petition, the Employer raised its rates in these areas to master levels. The Regional Director reasoned that the increases were not significant because the disparity had existed for many years and employees would not experience the full impact of the changes for several months. We disagree. Regardless of whether the employees immediately experienced the full benefits of the increases, what is significant is that the Employer raised its rates to the levels set forth in the Master Agreement based on negotiations that arose within the framework of the multiemployer bargaining relationship.

Thus, in key economic areas, the Employer has applied the terms of the Master Agreement or is moving toward—and in the case of LPN wage rates and sick, vacation, and longevity pay, has already achieved—master levels based on negotiated timetables. That there are minor variations on limited matters, i.e., shift differentials, uniform allowances, and lunch periods, is not inconsistent with an employer's intent to be bound by multiemployer bargaining.

In sum, here, the ''individual'' negotiations arose under the negotiated Industry Standards Clause and were limited in scope to closing the gap between parity and nonparity facilities. Thus, as the Intervenor and the Association contend, the negotiations were within the framework of the multiemployer bargaining relationship. In this regard, it is relevant that the Association bargained on the Employer's behalf with the Intervenor, and that the Employer did not otherwise participate in the negotiations.[5] There is no evidence that the Employer has ever unilaterally imposed its own terms and conditions of employment, and all the record evidence suggests otherwise. Further, as contended by the Association, negotiations occurred with regard to raising benefit levels for nonparity facilities as a whole—not for the Employer alone. We therefore find *Burns International Security Service*, 257 NLRB 387 (1981), cited by the Regional Director, to be distinguishable. In *Burns*, unlike here, a single employer unit was found to be appropriate when many of the multiemployer contract's terms were expressly not applicable to the petitioned-for employees,[6] many of the benefits the petitioned-for employees received were not incorporated into the master contract and it was unclear how they were achieved, and the individual employers unilaterally implemented other terms.

For these reasons, we find that the Employer exercised a mutually recognized privilege to bargain individually on limited matters and that this was not inconsistent with an intent to be bound by group bargaining. Accordingly, we shall remand the case to the Regional Director to vacate the election and take further action consistent with this Order.

[3] The first paragraph of the ''Fund Contribution Rates'' provision recognizes a lower contribution base for nonparity paraprofessional employees, and refers to the relevant portion of the ''Wage Increases'' provision, described above, which results in corresponding increases in the contribution base for fund contributions. This provision also states:

> For any non-master facility whose (a) pension and/or welfare fund contribution rates are lower than (b) the pension and/or welfare fund contribution rates of master facilities, the obligations hereunder and credits, if any, of any such facility shall be proportional to the extent of the difference between (a) and (b) above.

Lawson testified that although the Employer's unit employees receive the master level of Welfare Fund benefits, the Employer's contributions are at 80 percent of the master level for both LPNs and paraprofessionals. The Employer's Pension Fund contributions are also at 80 percent of the master level for paraprofessionals, who receive the master level of benefits. Master level employers, unlike the Employer, also make Pension Fund contributions on behalf of LPNs.

[4] The Regional Director dismissed as a ''bare assertion'' Lawson's testimony that the Employer's paraprofessionals receive the same fund benefits even though the Employer's rate of contribution is less than the master level. Lawson's testimony, however, is consistent with that of Ostreicher who listed only fund *contributions*, and not benefits, when asked about differences in terms and conditions between master and nonparity homes.

[5] Nursing home owners and administrators do not attend negotiating sessions, and the Employer's own representatives have never participated in bargaining strategy meetings with the Association. The employers are invited, however, to inform the Association if they want particular matters addressed during contract negotiations.

[6] Contractual provisons not applicable to the petitioned-for employees included: sick benefits, vacations, call-in pay, extra travel fare, limitation upon breakage and loss liability, canceled accounts, holidays, seniority for union officers, grievance time pay, employment examination expenses, limitations on stationary standing posts, extra work refusal, health and welfare trust funds, and travel pay.